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ORIGINAL
FILED
E-filing
JUL - 3 2008
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JL

CV 08 3251

APPLE INC., a California Corporation,

Plaintiff,

v.

PSYSTAR CORPORATION,

Defendant.

Case No.

COMPLAINT FOR COPYRIGHT INFRINGEMENT, INDUCED COPYRIGHT INFRINGEMENT, BREACH OF CONTRACT, TRADEMARK INFRINGEMENT, TRADE DRESS INFRINGEMENT AND UNFAIR COMPETITION

JURY TRIAL REQUESTED

Plaintiff Apple Inc. ("Apple") hereby alleges as follows:

BACKGROUND ALLEGATIONS

1. Apple is a California corporation with its headquarters and principal place of business at 1 Infinite Loop, Cupertino, California. Apple makes and sells well-known computer hardware, software and consumer products and services including the Macintosh® computer, the iPod® music player and the iPhone™. Founded in 1976, Apple has been consistently ranked as one of the most innovative companies in the world. Apple currently employs approximately 28,000 people worldwide, owns and operates over 200 retail stores, and sells its products online as well. In 2008, *Fortune Magazine* named Apple "America's Most Admired Company."

2. A pioneer of the personal computer revolution, Apple launched its Macintosh line of computers in 1984. Apple's Macintosh computers (or "Mac") introduced such novel innovations as the mouse, computer icons and the graphical user interface. Apple's "perennially praised" Macintosh line of computers includes the Mac®, Mac Pro®, iMac®, Mac® mini, MacBook®, MacBook Pro and MacBook Air. Since 2001, Apple has sold more than 29 million Macintosh computers.

3. Apple's Macintosh computers are famous for their reliability, ease-of-use and innovative industrial design. Apple's development teams have seamlessly integrated the hardware and software features of Macintosh computers such that the use of the computers is intuitive, efficient and pleasurable. Moreover, the unified, integrated Mac system is simpler to service, update and maintain. Indeed, for eight consecutive years *Consumer Reports* has ranked Apple's technical support for its customers best in the nation for both desktop and laptop computers, surpassing Dell, Hewlett-Packard, Sony, Toshiba, Gateway and Lenovo.

4. In 2001, Apple launched the tenth generation of its operating system - Mac OS X. Mac OS X revolutionized operating system architecture, adding extraordinary capabilities, speed and stability. Apple's most recent version of Mac OS X, version 10.5, known as "Leopard®," has been described by reviewers as "visually stunning," "powerful, polished and carefully conceived," and "elegant." Other reviewers have said the "grace of Leopard's interface elements makes productivity more pleasurable with a Mac," all the result "of years of hard, diligent work by the development teams at Apple."

5. The Mac OS X user interface combines the use of color, transparency and animation together with the overall arrangement and set up of various icons in a unique and creative manner. In addition, the Finder toolbar containing the famous Apple mark is combined with a distinctive three-dimensional applications bar (or "dock") on which various icons reside. The distinctive nonfunctional combination of elements that makes up the Mac OS X user interface is well known to consumers and has become associated with Apple and Mac OS X Leopard. This combination of elements shall be referred to hereafter as "Apple's Trade Dress."

6. Mac OS X, including the Leopard® version, has been the subject of numerous articles in general circulation newspapers, magazines and online publications, as well as radio, television and

Internet broadcasts. The product has received significant acclaim and in recent years sales of Mac computers have surged, growing at a faster pace than the personal computer market in general.

7. Apple also manufactures and sells the Xserve® rack-mount server for use in businesses needing to connect multiple computers to a single server. The Xserve uses Mac OS X Leopard Server as its operating system software. Mac OS X Leopard Server has also been the subject of numerous articles, publications and media coverage both on television and radio and on the Internet.

8. The Apple brand, including its registered trademarks Apple® and Mac®, is one of the most famous brands in the world. Since inception, Apple has continuously and extensively promoted, offered and sold its Mac computers, and its related goods and services, in interstate commerce under the various Apple and Mac trademarks. Since 1994, Apple has spent more than $3 billion to promote its brand, including the Apple and Mac trademarks. Apple's brand, including its various marks and distinctive trade dress, have become synonymous with high quality, innovative, elegant and user-friendly consumer electronics products. Indeed, among many other accolades over the years, for each of the past three years *BusinessWeek Magazine* named Apple the "World's Most Innovative Company." The Apple brand and trademarks consistently are ranked by independent research organizations as being among the fifty most valuable brands on earth.

9. As a result of Apple's continuous and extensive use and promotion, the consuming public nationwide understands that Apple's various marks and distinctive trade dress identify Apple's goods and services, and associates the marks with Apple exclusively. Because of the consistent quality of Apple's goods and services marketed under and in association with Apple's trademarks and distinctive trade dress, Apple has established considerable good will and reputation with respect to its goods and services.

10. Apple's use of its Apple and Mac marks has been exclusive and continuous since long prior to the date of Defendant's first infringing acts described below. Furthermore, the Apple marks and distinctive trade dress became famous among the general consuming public long before the date of Defendant's first infringing use. The various Apple marks and distinctive trade dress are well known and are among the most important assets of Apple.

11. On information and belief, Defendant Psystar Corporation ("Psystar" or "Defendant") is

a corporation organized and existing under the laws of the State of Florida with its principal places of business at 10475 NW 28th Street, Doral, Florida and/or 10645 SW 112 Street, Miami, Florida 33176.

12. In April, 2008, without authorization from Apple, and in violation of the terms of the Software License Agreement governing the use of Mac OS X software and Apple's intellectual property, Psystar began selling in commerce a computer named the OpenMac which apparently runs a modified, unauthorized, version of the Leopard operating system. Thereafter Psystar changed the name of its product to Open Computer, but continued to sell it with the Leopard operating system, without authorization from Apple. Psystar sells its computers online and ships them throughout the United States, including into the Northern District of California. Psystar's Chief Executive Officer has been quoted as saying that Psystar has sold "thousands" of these computers. In addition, without Apple's permission or consent, Psystar makes copies of, and offers to customers for download from its website, www.psystar.com, "updates" to the Leopard software that are either direct copies of Apple-generated updates and/or unauthorized modified versions of software updates from Apple.

13. In June, 2008, Psystar began selling in commerce rack-mount servers called the OpenServ 1100 and OpenServ 2400. Without authorization from Apple, and in violation of the terms of the Software License Agreement governing the use of the Mac OS X Leopard Server software and Apple's intellectual property, Psystar has offered for sale and, on information and belief, sold OpenServ 1100 and OpenServ 2400 servers utilizing the Mac OS X Leopard Server software.

14. Online commentators have reported that Psystar's computer is "missing stuff like iLife, Bluetooth, an IR receiver, DVD burning and the ability to update your computer," is "LOUD, Crazy Loud," it "breaks the OS' automatic updates," and that "video was DOA right out of the box. No signal going to monitor. Boot up is moot point as there is nothing to see." Of Psystar itself reviewers have written, "they have no quality control," "lousy tech support," and "All I want to do is return the computer and get a refund." Likewise, it has been reported that Psystar has repeatedly changed locations, that its office could not be found, and that its first on-line payment processor terminated Psystar's account.

15. As alleged more fully below, by misappropriating Apple's proprietary software and intellectual property for its own use, Psystar's actions harm consumers by selling to them a poor

product that is advertised and promoted in a manner that falsely and unfairly implies an affiliation with Apple. Psystar's actions also have caused, and are causing, harm to Apple and constitute a misuse of Apple's intellectual property. To prevent this continued unfair and unlawful exploitation of Apple's proprietary technology, and to avoid further consumer confusion and injury, Apple seeks an injunction against further misappropriation and infringement of its intellectual property, an award of actual damages, treble damages and its attorneys' fees and costs of suit.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction pursuant to 28 U.S.C. sections 1331, 1332, and 1338 because this action arises under the copyright and trademark laws of the United States, there is complete diversity of citizenship between the parties, and the amount in controversy exceeds $75,000.

17. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391 because Psystar has done business in this judicial district, has committed acts of copyright and trademark infringement in this district, has breached a contract with a substantial impact in this district, has engaged in unfair competition in this district, and continues to commit such acts in this district. Because this is an Intellectual Property case, it is not subject to the intra-District venue provisions of Northern District of California Local Rule 3-2(c).

GENERAL ALLEGATIONS

18. Apple licenses the use of its Macintosh operating system ("Mac OS") software for use only on Apple-labeled hardware. Indeed, an original version of the Mac OS is available only with the purchase of a Macintosh computer. Upgrades to the Mac OS may be licensed separately, but the terms of the license prohibit use of the Mac OS or its upgrades on non-Apple hardware.

19. The Software License Agreement for Mac OS X Leopard (and Mac OS X Leopard Server) ("License Agreement") provided with each version of Mac OS X Leopard and Mac OS X Leopard Server are attached hereto as Exhibits 1 and 2, and are incorporated herein by reference. The Mac OS X Leopard License Agreement specifies, in relevant part:

> "1. **General**. The software (including Boot ROM Code)... accompanying this License whether preinstalled on Apple-labeled hardware, on disk, in read only memory, or any other media or in any other form (collectively,

> the "Apple Software") are licensed, not sold, to you by Apple Inc. ("Apple") for use only under the terms of this License, and Apple reserves all rights not expressly granted to you....
>
> 2. **Permitted License Uses and Restrictions.**
>
> A. Single Use. This license allows you to install, use and run one (1) copy of the Apple Software on a single Apple-labeled computer at a time. You agree not to install, use, or run the Apple Software on any non-Apple-labeled computer or enable another to do so....
>
> * * * *
>
> "5. **Termination**. This license is effective until terminated. Your rights under this License will terminate automatically from Apple if you fail to comply with any term(s) of this License...."

The Mac OS X Leopard Server License Agreement includes the same terms.

20. Psystar claims the "Open Computer is a PC that works just like a Mac with Apple's latest operating system OS X 10.5 a.k.a. Leopard." Psystar claims its product "is ready to run out of the box when you purchase it with Leopard included. If you buy Leopard with your Open Computer we'll install it for free." Psystar also says "The Open Computer can now be purchased with Leopard included and pre-installed," (emphasis in original) and that OpenServ computers also run "Mac OS X Leopard Server."

21. Apple has never authorized Psystar to install, use, or sell the Mac OS software on any non-Apple-labeled hardware.

FIRST CLAIM FOR RELIEF
(Copyright Infringement)
(17 U.S.C. Sections 501 *et seq.*)

22. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

23. Mac OS, Mac OS X, Mac OS X version 10.5, and Mac OS X Server all are original works of authorship created by Apple constituting copyrightable subject matter (hereafter, "the Copyrighted Works").

24. Apple is the owner of, among others, United States copyright registrations TX4-669-971 (Mac OS); TX5-401-457 (Mac OS X); TX6-849-489 (Mac OS X Leopard Version 10.5); TX4-991-736 (Mac OS X Server); and TX6-849-684 (Mac OS X Server Version 10.5 Leopard). The

effective date of Apple's copyright registrations predates the commencement of infringement by Psystar.

25. Defendant has reproduced, distributed and/or displayed the Copyrighted Works in violation of Apple's exclusive rights under the Copyright Act. Apple has not licensed or otherwise authorized Defendant's reproduction, distribution or display of the Copyrighted Works.

26. Apple is informed and believes, and on that basis alleges, that Defendant's infringement of Apple's copyrights in the Copyrighted Works is, and continues to be, intentional, willful and in conscious disregard of Apple's rights.

27. Apple is informed and believes, and on that basis alleges, that Defendant has realized profit by virtue of its infringement of Apple's copyrights.

28. Apple has sustained economic damage as a result of Defendant's infringement of Apple's copyrights in an amount to be proven at trial.

29. Apple is entitled to recover the actual damages it has suffered and/or any profits gained by Defendant that are attributable to its acts of copyright infringement pursuant to 17 U.S.C. § 504(b). Alternatively, Apple is entitled to the maximum statutory damages allowed under 17 U.S.C. § 504(c) based on Defendant's willful acts of copyright infringement. Apple will make its election at the appropriate time before final judgment is rendered.

30. Pursuant to 17 U.S.C. § 502, Apple is entitled to an injunction against Defendant's continuing reproduction, distribution and display of Apple's copyrighted materials.

31. Apple is further entitled to recover its full costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

SECOND CLAIM FOR RELIEF
(Contributory and Induced Copyright Infringement)
(17 U.S.C. § 501, *et seq.*)

32. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

33. Defendant is aware that its actions as described above infringed and continue to infringe Apple's copyrights and exclusive rights to reproduce, display and distribute Apple's copyrighted materials.

34. By offering for sale copies of Apple software to actual and potential purchasers for use on non-Apple-labeled computers, and by providing services to install Apple software to cause it to operate on non-Apple-labeled computers, Defendant has induced, caused or materially contributed to the infringing conduct of purchasers.

35. Apple is informed and believes, and on that basis alleges, that Defendant's inducement of infringement of Apple's copyrights in the Copyrighted Works is, and continues to be, intentional, willful and in conscious disregard of Apple's rights.

36. Apple is informed and believes, and on that basis alleges, that Defendant has realized profit by virtue of its inducement of infringement of Apple's copyrights.

37. Apple has sustained economic damage as a result of Defendant's inducement of infringement of Apple's copyrights in an amount to be proven at trial.

38. Apple is entitled to recover the actual damages it has suffered and/or any profits gained by Defendant that are attributable to its acts of copyright infringement pursuant to 17 U.S.C. § 504(b). Alternatively, Apple is entitled to the maximum statutory damages allowed under 17 U.S.C. § 504(c) based on Defendant's willful acts of copyright infringement. Apple will make its election at the appropriate time before final judgment is rendered.

39. Pursuant to 17 U.S.C. § 502, Apple is entitled to an injunction against Defendant's continuing reproduction, distribution and display of Apple's copyrighted materials.

40. Apple is further entitled to recover its full costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

THIRD CLAIM FOR RELIEF
(Breach of Contract)

41. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

42. Apple is informed and believes, and on that basis alleges, that Psystar has acquired Mac OS X version 10.5 software, that Psystar opened the box in which the software disk and license were packaged, opened the seal on the shrink-wrapped software disk, and thereafter installed the Leopard operating system and/or Leopard Server software on computers. By so doing Psystar